

APR 01 2005

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re:)	BAP No.	AZ-04-1011-ZMoS
)		
LOGAN T. JOHNSTON, III,)	Bk. No.	01-06221-SSC
)		
Debtor.)	Adv. No.	01-00988-SSC
)		
_____ PAULA PARKER,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
LOGAN T. JOHNSTON, III, and)		
CELESTE JOHNSTON,)		
)		
Appellees.)		
_____)		

Argued and Submitted on February 24, 2005
at Phoenix, Arizona

Filed - April 1, 2005

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Chief Bankruptcy Judge, Presiding.

Before: ZIVE,² MONTALI, and SMITH, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Gregg W. Zive, Chief Bankruptcy Judge for the District of Nevada, sitting by designation.

1 Plaintiff/Creditor/Appellant, Paula Parker ("Parker"),
2 appeals the bankruptcy court's determination that the entire
3 "equalizing judgment" and "supplemental judgment" debt awarded to
4 Parker in the divorce decree between Parker and Defendant/
5 Debtor/Appellee, Logan T. Johnston, III ("Johnston") was
6 dischargeable pursuant to 11 U.S.C. § 523(a)(15)(B).³ Parker also
7 asks us to determine whether a certain award of attorneys fees
8 should be classified as non-dischargeable pursuant to section
9 523(a)(5). We hold the bankruptcy court did not abuse its
10 discretion in applying the legal standard under section
11 523(a)(15)(B) nor did it commit clear error in arriving at its
12 factual findings. Further, even if Parker could avoid the
13 stipulation she entered into, she did not present an adequate
14 record on which we can examine the classification of attorneys
15 fees under section 523(a)(5). Accordingly, we AFFIRM.

16 **I. FACTS**

17 Parker and Johnston were married in 1972. The parties were
18 divorced by operation of a decree of dissolution of marriage
19 entered January 3, 1996 ("Divorce Decree"). The Divorce Decree
20 provided for division of the parties' personal and real property
21 and awarded Parker spousal maintenance, child support and an
22 equalizing judgment in the amount of \$366,948.45 (the "Equalizing
23
24
25

26
27 ³ Unless otherwise indicated, all references to "chapter"
28 or "section" shall be to the Bankruptcy Code, 11 U.S.C. §§ 101, et
seq. and the Federal Rules of Bankruptcy Procedure, Rules 1001, et
seq.

1 Judgment").⁴ Parker appealed the Divorce Decree and was awarded a
2 supplemental judgement by the Arizona Court of Appeals in the
3 amount of \$59,115.00 ("Supplemental Judgment"). On January 22,
4 2001, Parker filed a Petition To Show Cause why Johnston should
5 not be held in contempt for failure to pay accrued spousal
6 maintenance provided for in the Divorce Decree. Johnston filed
7 for bankruptcy under Chapter 11 May 14, 2001.

8 Parker filed an adversary complaint August 27, 2001 against
9 Johnston and his current wife, Celeste Johnston (together with
10 Johnston, the "Johnstons"), seeking a determination, in part, that
11 the debts arising from the Equalizing Judgment and Supplemental
12 Judgment are non-dischargeable pursuant to section 523(a)(15). An
13 amended complaint was filed seeking the same relief. Johnston
14 answered the amended complaint, denying that the judgments are
15 non-dischargeable under section 523(a)(15).

16 Certain pre-trial motions for dismissal and summary judgment
17 were denied, and the bankruptcy court clarified the issue to be
18 heard at trial at a hearing conducted July 10, 2002. In the
19 Stipulated Pretrial Order entered April 25, 2003, the parties
20 stipulated to the amount of the judgments at issue: the sum of
21 \$322,335.35, with accrued interest in the amount of \$42,729.31 as
22 of August 19, 2002 is owed on the Equalizing Judgment; the sum of
23 \$59,115.00 plus interest accruing at the rate of 10% per annum

24
25 ⁴ The Amended Complaint filed by Parker in the adversary
26 proceeding also requested a determination of the non-
27 dischargeability of spousal maintenance debt pursuant to
28 § 523(a)(5). The parties stipulated to the payment of \$80,093.91
for previously unpaid spousal maintenance in the Stipulated
Pretrial Order. Therefore, the non-dischargeability of spousal
maintenance is not the subject of this appeal.

1 since April 7, 1988 is owed on the Supplemental Judgment. The
2 trial occurred May 7, 2003 and was continued to August 4, 2003.

3 The bankruptcy court issued its written Memorandum Decision
4 September 12, 2003 finding Johnston had met his burden of
5 persuasion under section 523(a)(15)(B) and that the entire debt at
6 issue was dischargeable. The Order Incorporating Memorandum
7 Decision was entered September 18, 2003. Parker timely filed a
8 Motion for Reconsideration which was denied December 18, 2003. On
9 December 29, 2003, Parker filed a Notice of Appeal. The
10 bankruptcy court issued its written Memorandum Decision regarding
11 the Motion for Reconsideration March 11, 2004. The Order
12 Incorporating Memorandum Decision was entered March 12, 2004.
13 Parker filed a Memorandum Regarding Classification of Award of
14 Attorneys Fees to Ms. Parker March 19, 2004, which the bankruptcy
15 court treated as a Second Motion for Reconsideration. The Order
16 Denying Parker's Second Motion For Reconsideration was entered
17 April 27, 2004.

18 **II. ISSUES**

- 19 A. Whether the bankruptcy court applied the incorrect
20 legal standard under section 523(a)(15).
- 21 B. Whether the bankruptcy court erred in determining that
22 the discharge of the debt would result in a benefit to
23 Johnston, but would have no detrimental effect on
24 Parker.
- 25 C. Whether the bankruptcy court erred in declining to
26 classify as non-dischargeable an award of \$15,000 for
27 attorneys' fees awarded to Parker by the state court.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. STANDARD OF REVIEW

The Bankruptcy Appellate Panel reviews the "bankruptcy court's findings of fact for clear error and the court's conclusions of law *de novo*." Jodoin v. Samoya (In re Jodoin), 209 B.R. 132, 135 (9th Cir. BAP 1997) (internal citations omitted); Fed. R. Bankr. P. 8013. Mixed questions of law and fact are also reviewed *de novo*. See id. (internal citations omitted). *De novo* review means that the appellate court views the case from the same position as the district court. Lake Mohave Boat Owners Ass'n v. National Park Serv., 138 F.3d 759, 762 (9th Cir. 1998).

The bankruptcy court abuses its discretion if it does not apply the correct law. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1464 (9th Cir. 1995). An evaluation of the "balance of the equities" test (also known as the "Detriment" test) found in section 523(a)(15)(B) requires the bankruptcy court reach an equitable conclusion. The reviewing court will review the decision for an abuse of discretion. See Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1121 (9th Cir. 2000). The reviewing court finds an abuse of discretion when it has a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." Kayes, 51 F.3d at 1464 (internal quotations and citations omitted).

IV. DISCUSSION

A. The bankruptcy court applied the correct legal standard under section 523(a)(15).

A debt incurred by the debtor in the course of a divorce, other than a debt for spousal maintenance or child support, is

1 non-dischargeable unless:

- 2 (A) the debtor does not have the ability to pay such debt
3 from income or property of the debtor not reasonably
4 necessary to be expended for the maintenance or support
5 of the debtor or a dependent of the debtor . . . ; or
6 (B) discharging such debt would result in a benefit to the
7 debtor that outweighs the detrimental consequences to a
8 spouse, former spouse, or child of the debtor[.]

9 11 U.S.C. § 523(a)(15). The test set forth in (A) is referred to
10 as the "Ability to Pay" test. See Jodoin, 209 B.R. at 139 n.17.
11 The test set forth in (B) is referred to as the "Detriment" test.
12 Id. at 139 n.18. Once the creditor demonstrates that the debtor
13 incurred the debt in connection with divorce, the burden shifts to
14 the debtor to come forward with evidence to establish the
15 viability of either test. Id. at 141.

16 Parker has asked us to depart from the plain language of
17 section 523(a)(15) and case law interpreting the same and find
18 that the two prongs of section 523(a)(15) are not actually two
19 different tests, but instead require the following analysis
20 proposed by Parker in her Opening Brief:

- 21 (1) It should first determine whether the Debtor/Defendant
22 had the ability to repay some or all of the debt in
23 question without significantly impairing his own
24 maintenance or support, the maintenance or support of
25 his family or the maintenance of his business. If the
26 Debtor/Defendant does not have the ability to repay any
27 of the subject debt, then the inquiry ends and the debt
28 is dischargeable.
- (2) If, however, the Debtor does have the ability repay
some or all of the subject debt, then the Bankruptcy
Court should determine how much of the debt should be
equitably discharged and how much should be equitably
nondischargeable, and may determine the terms of
repayment of the § 523(a)(15) debt.

Appellant's Opening Brief at 9-10. Parker argues that this
interpretation is the law as articulated by the Ninth Circuit in
Myrvang, 232 F.3d at 1116. The Ninth Circuit held that a

1 bankruptcy court has the discretion to order a partial discharge
2 of a separate debt arising out of the terms of a divorce decree.
3 Id. at 1124. Moreover, the bankruptcy court in Myrvang ordered
4 the partial discharge because the debtor could not satisfy his
5 burden under the Ability to Pay test of section 523(a)(15)(A).
6 Id. at 1120. The debtor in Myrvang also failed to satisfy his
7 burden under the Detriment test. Id. at 1119. In this case,
8 Johnston failed to satisfy his burden under the Ability to Pay
9 test,⁵ however, the bankruptcy court found Johnston did satisfy
10 his burden under the Detriment test.

11 Myrvang holds that the bankruptcy court may order a partial
12 discharge under the Ability to Pay test (the court did not address
13 a partial discharge under the Detriment test). Nowhere does
14 Myrvang provide that the bankruptcy court must order a partial
15 discharge. Parker's interpretation of section 523(a)(15) and
16 Myrvang asks us to ignore the plain language of the statute. In
17 every case cited by Parker, the bankruptcy court applied both
18 section 523(a)(15) tests, and if the debtor satisfied the burden
19 under either the Ability to Pay test or the Detriment test, the
20 debt was held to be dischargeable, or as in Myrvang, partially

22 ⁵ If the bankruptcy court did make any factual errors, it
23 was with respect to the Johnston's failure to satisfy his burden
24 under the Ability to Pay test. The Memorandum Decision states
25 that by devoting his entire disposable income to Parker, Johnston
26 would be able to repay Parker the Equalizing and Supplemental
27 Judgments in 10 to 15 years from the date of trial. As explained
28 by Johnston, the bankruptcy court's calculation underestimated the
time it would take to pay Parker because of the accrued interest.
Appellee's Brief at 22. While the court's decision under the
Ability to Pay test is not the subject of appeal, it is important
to note this error when considering Parker's argument that if
Johnston had the ability to pay the entire debt, he should only
receive a partial discharge under the Detriment test.

1 dischargeable. See e.g., Myrvang, 232 F.3d 1116; In re Jodoin,
2 209 B.R. 132 (9th Cir. BAP 1997); In re Beckford, 257 B.R. 7 (C.D.
3 Cal. 2000); In re Greenwalt, 200 B.R. 909 (W.D. Wash. 1996).⁶

4 In applying the Detriment test, the bankruptcy court examined
5 the financial condition of both parties and found the Johnstons'
6 economic resources were more limited than Parker. The bankruptcy
7 court listed Parker's significant assets as detailed in her
8 statement of financial condition. The bankruptcy court found that
9 the Johnstons had no stocks, bonds, individual retirement
10 accounts, pensions, savings, life insurance, or health insurance;
11 that the Johnstons owned a home with little or no equity; and that
12 their personal property, exclusive of items valued at less than
13 \$500, had been appraised at a value of \$23,075. The bankruptcy
14 court also examined the current expenses of the parties, including
15 the \$2,000 payment of spousal maintenance Parker receives from
16 Johnston. When balancing the equities among the parties, the
17 bankruptcy court found that the benefit of the discharge would not
18 facilitate a more prosperous lifestyle for the Johnstons and would
19 instead allow Mr. Johnston to proceed with his Chapter 11
20 reorganization. The bankruptcy court found that Parker was
21 independently wealthy and had no need for the funds at issue. The
22 bankruptcy court concluded that Johnston's discharge and its
23 benefit outweighed the detriment to Parker.

24
25 ⁶ Parker also cited to an unpublished opinion from the
26 Fourth Circuit Court of Appeals. Ballard v. Ballard (In re
27 Ballard), 69 Fed. Appx. 145 (4th Cir. 2003). Ballard is not
28 binding upon the Panel. The court in Ballard found that "there is
no real dispute that both parties have disposable monthly income
and will suffer little detriment or receive little benefit if the
[subject debt] is paid over time or discharged." Id. at 149. The
same cannot be said of the parties in this case.

1 Parker argues that the decision to discharge the entire debt
2 was not justified by the evidence presented at trial. Parker
3 complains primarily of alleged factual errors as discussed below.
4 Based on the evidence considered by the bankruptcy court, and the
5 lack of factual errors, Parker has failed to demonstrate the
6 bankruptcy court abused in its discretion in determining the
7 entire debt was dischargeable.

8 Parker fails to provide any compelling argument or legal
9 authority that the bankruptcy court applied the incorrect law, or
10 abused its discretion, including its decision that a partial
11 discharge of the disputed debt was not appropriate.

12 **B. The bankruptcy court did not err in determining that**
13 **the discharge of the debt would result in a benefit to**
14 **Johnston, but would have no detrimental effect on**
Parker.

15 Parker's argument that the bankruptcy court erred in
16 determining that the discharge of the Equalizing and Supplemental
17 Judgments would have no detrimental effect on Parker consists of a
18 challenge to various factual findings made by the bankruptcy court
19 which are reviewed for clear error. See Jodoin, 209 B.R. at 135.
20 Each alleged factual error will be evaluated below:

21 1. The Johnstons' Income

22 Parker argues that the bankruptcy court erred in determining
23 the Johnstons' income. The majority of the findings Parker
24 disputes are not material. Parker complains of findings made with
25 respect to the Johnstons' income and tax returns in 1999-2001.
26 These are largely irrelevant and do not rise to the level of clear
27 error because the bankruptcy court also reviewed the parties'
28 financial information as of the time of trial. Jodoin, 209 B.R.

1 at 142. Prior to trial, Johnston filed amended Schedules I and J
2 stating current gross income of \$13,000 and \$3,000 per month, for
3 Johnston and his spouse, respectively. The combined monthly
4 income after taxes stated for Johnston and his spouse was
5 \$12,855.34. Parker argues the bankruptcy court should have taken
6 the average of the past 12 months' worth of operating reports to
7 arrive at an income of approximately \$17,005.68 per month.⁷ While
8 Parker also complains about Johnston's method of preparing the
9 operating reports,⁸ she failed to submit the operating reports as
10 part of the appellate record so we do not have an adequate
11 record.⁹ It is the appellant's burden to present an adequate
12 record on review. See Kritt v. Kritt (In re Kritt), 190 B.R. 382,
13 387 (9th Cir. BAP 1995). Unless the record before the appellate
14 court affirmatively shows the matters on which appellant relies
15 for relief, the appellant may not argue those matters on appeal.

16
17 ⁷ Johnston's calculations omit \$69,000 for a personal
18 injury contingency fee. Johnston testified that he does not
19 regularly practice in the area of personal injury and this case
20 was a fluke. Parker has argued that Johnston should start
21 practicing in the area of personal injury law so he can increase
22 his income. Johnston submitted testimony about the challenges of
23 switching fields of practice this late in his career (he was 56 at
24 the time of trial) and the substantial costs to start a
25 plaintiff's personal injury practice. Parker introduced no
26 evidence to the contrary. Parker now complains that Johnston
27 could practice personal injury defense, but did not present any
28 evidence of the possibility at trial.

23 ⁸ Johnston was subject to extensive cross-examination
24 about the preparation of the operating reports. It is within the
25 trial court's discretion to assess the credibility of witnesses.
26 See F.R.C.P. 52(a) ("due regard shall be given the opportunity of
27 the trial court to judge the credibility of the witnesses").

26 ⁹ Johnston listed the income stated from the operating
27 reports in his brief. See Appellee's Opening Brief at 14. Using
28 an average for all operating reports submitted at the time of
trial (26 months), instead of the 12-month average, and
subtracting the contingency fee because it was an extraordinary
event, reflects a monthly average of \$13,043 for Johnston.

1 Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir.
2 1994).

3 The bankruptcy court heard testimony from the parties,
4 reviewed the amended Schedules I and J, and received the operating
5 reports into evidence, in order to arrive at a figure for the
6 Johnstons' monthly income. There is ample evidence in the record
7 to support the bankruptcy court's conclusion with respect to the
8 Johnstons' monthly income. Parker fails to provide any evidence
9 that the bankruptcy court's findings of fact are unsupported. We
10 cannot find that the bankruptcy court committed clear error.

11 2. The Johnstons' Expenditures

12 Parker argues the bankruptcy court erred in determining that
13 the Johnstons' expenditures were reasonable under the
14 circumstances. Parker argues that the evidence submitted at trial
15 reveals the Johnstons' live an extravagant lifestyle. Parker
16 complains of the value of the Johnstons' residence, Ms. Johnston's
17 law school tuition, car expenses, cable and DSL service, and the
18 purchase of a \$5,000 mattress for Ms. Johnston's back pain.
19 Parker simply lists these expenses and fails to make any argument
20 or introduce any evidence that these expenses are unreasonable or
21 excessive. Because the bankruptcy court received evidence and
22 heard testimony from the Johnstons with respect to each of the
23 expenses, and because Parker failed to introduce any evidence that
24 the expenses were unreasonable or excessive, we cannot find that
25 the bankruptcy court committed clear error.

26 3. Parker's Financial Situation

27 Parker argues the bankruptcy court made a number of errors
28 regarding her assets and income. The bankruptcy court's findings

1 in the Memorandum Decision with respect to Parker's assets and
2 income are consistent with the evidence submitted by Parker at
3 trial.¹⁰ Parker argues that several of her assets are not liquid,
4 but fails to cite any authority or support for her argument that
5 they should have been excluded from the bankruptcy court's
6 consideration. Parker would have liked the bankruptcy court to
7 accept her testimony that her income is declining,¹¹ but the
8 bankruptcy court eliminated speculation about Parker's future
9 financial condition, including an approximate \$2.4 million
10 interest in Illinois real property. See Appellant's Opening Brief
11 at 18; Appellee's Opening Brief at 24. The bankruptcy court's
12 Memorandum Decision cites to Parker's assets and Parker has failed
13 to submit any evidence that even if her income were declining,
14 such a fact would shift the balance of equities in her favor.
15 Accordingly, we cannot find that the bankruptcy court committed
16 clear error.

17 **C. Parker has presented an insufficient record to**
18 **determine whether the bankruptcy court erred in**
19 **declining to classify as non-dischargeable an award of**
20 **\$15,000 for attorneys' fees awarded to Parker by the**
21 **state court.**

22 Parker argues the bankruptcy court erred in not including the
23 \$15,000 in attorneys' fees awarded by the Arizona Superior Court
24 in Johnston's section 523(a)(5) obligations. The Minute Entry

25 ¹⁰ Memorandum Decision (September 12, 2003), at pp. 11-12;
26 Paula Parker Statement of Financial Condition (February 28, 2003).

27 ¹¹ Parker filed her 2002 tax return with the Supplement To
28 Parker's Motion to Reconsider the Memorandum Decision presumably
to demonstrate her income was declining. Assuming Parker's income
is declining, the bankruptcy court still had the discretion to
consider the total financial picture of the Johnstons and Parker
in balancing the equities under § 523(a)(15)(B). See Myrvang, 232
F.3d at 1121.

1 Order awarding these fees was admitted at trial. The Stipulated
2 Pretrial Order provides the parties stipulated to the amount of
3 the debt subject to classification under section 523(a)(5). The
4 Memorandum Decision entered September 18, 2003 does not discuss
5 the non-dischargeability of the award under section 523(a)(5)
6 because the parties stipulated to the amount and non-
7 dischargeability of such fees in the Stipulated Pretrial Order.

8 Parker did not raise the issue of the \$15,000 award in the
9 Motion to Reconsider Memorandum Decision filed September 29, 2003.
10 Parker did not raise the issue in the Supplement to Parker's
11 Motion to Reconsider Memorandum Decision filed November 3, 2003.
12 Parker first raised the issue at the hearing on the Motion to
13 Reconsider held on December 18, 2003. Parker did not include the
14 transcript of the December 18, 2003 hearing as part of the
15 appellate record.¹² The bankruptcy court entered a Memorandum
16 Decision and Order on March 15, 2004 denying the Motion for
17 Reconsideration. Parker filed a Memorandum Regarding
18 Classification of Award of Attorneys Fees to Ms. Parker on March
19 19, 2004. It is not clear whether there was a hearing on the
20 Memorandum Regarding Classification of Award of Attorneys Fees;
21 however, if there was, the hearing transcript was not submitted as
22 part of the appellate record. The bankruptcy court denied the
23 Memorandum Regarding Classification of Award of Attorneys Fees in
24 an Order titled Order Denying Ms. Parker's Second Motion for
25 Reconsideration entered April 26, 2004. The Order provides that

26
27 ¹² Pursuant to 9th Cir. BAP Rule 8006-1, "The excerpts of
28 record shall include the transcripts necessary for adequate review
in light of the standard of review to be applied to the issues
before the Panel."

1 the court has placed its "Findings of Fact and Conclusion of Laws"
2 on the record. We have not been provided with a copy of the
3 record to examine these findings and conclusions.¹³

4 Because the parties stipulated to the amount and non-
5 dischargeability of fees pursuant to section 523(a)(5), and
6 because Parker has failed to provide an adequate record on which
7 to examine the bankruptcy court's findings, we cannot reverse the
8 bankruptcy court's decision declining to classify those fees as
9 non-dischargeable.

10 **V. CONCLUSION**

11 The bankruptcy court did not err in interpreting
12 section 523(a)(15)(B) and its application in this case. Parker
13 has presented an insufficient record to determine whether the
14 bankruptcy court erred in declining to classify as non-
15 dischargeable the \$15,000 award of attorneys' fees to Parker. The
16 bankruptcy court's orders of September 18, 2003, December 22,
17 2003, March 15, 2004, and April 27, 2004 are AFFIRMED.

18
19
20
21
22
23
24

25 ¹³ The burden of presenting a proper record to the
26 appellate court is on the appellant. Kritt v. Kritt (In re
27 Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). Unless the record
28 before the appellate court affirmatively shows the matters on
which appellant relies for relief, the appellant may not argue
those matters on appeal. Everett v. Perez (In re Perez), 30 F.3d
1209, 1217 n.12 (9th Cir. 1994).